92-1675

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1992 TERM

W. PAT CROW FORGINGS, INC.,

Petitioner,

V.

TRANSTECHNOLOGY CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ATTORNEYS FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a district court, sitting in diversity, deprives a party of its right to procedural due process by levying, pursuant to the district court's inherent power, the punitive sanction of dismissal of a claim against the party, without affording the party notice and a hearing on the record?

2. Whether a district court, sitting in diversity, violates the doctrine set forth in Erie R. Co. v. Tompkins, and its progeny, by levying, pursuant to the district court's inherent power, a sanction against a party which denies the party its substantive state law right to recover attorneys' fees?

LIST OF PARTIES

The following are parties to the proceeding in the court whose judgment is sought to be reviewed or are current or former attorneys for one of the parties:

1. W. Pat Crow Forgings, Inc. - Petitioner.

2. TIC Investment Corp. - parent company of Petitioner.

3. Hon. John McBryde, formerly of the firm of McBryde & Green, then McBryde & Bennett - counsel for Petitioner in the district court below from June 20, 1985 through November 1989.

4. Bill F. Bogle, Roland K. Johnson, and Andrew D. Sims, of the firm of Harris, Finley, Creel & Bogle, P.C., now Harris, Finley & Bogle, P.C., Fort Worth, Texas - counsel for Petitioner in the district court below.

5. Bill F. Bogle and Andrew D. Sims of the firm of Harris, Finley & Bogle, P.C. - counsel for Petitioner on appeal.

6. TransTechnology Corporation - Respondent.

7. Joe B. Harrison and Mark W. Bayer of the firm of Gardere & Wynne, Dallas, Texas - counsel for Respondent in the

district court below from June 20, 1985 through October 4, 1985.

8. Daniel J. Sheehan, Lisa Williams, and Marc Culp of the firm of Sheehan, Young, Smith & Culp, now Sheehan, Young & Culp, Dallas, Texas - counsel for Respondent in the district court below.

9. Robert R. Bodoin of the firm of McLean & Sanders, Fort Worth, Texas - counsel for Respondent in the district court below.

10. Daniel J. Sheehan and Marc Culp, of the firm of Sheehan, Young & Culp - counsel for Respondent on appeal.

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

W. PAT CROW FORGINGS, INC.,

Petitioner,

V.

TRANSTECHNOLOGY CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner herein prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review

that Court's December 23, 1992 Judgment and Order in this proceeding.

OPINIONS BELOW

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit, from which review is sought, is not reported, but is attached as Appendix A to this Petition.

The Order of the Court of Appeals denying Petitioner's Petition For Rehearing is not reported, but is attached as Appendix B to this Petition.

The Order of the United States District Court for the Northern District of Texas dated February 12, 1992, from which Petitioner appealed, is not reported, but is attached as Appendix C to this Petition.

The Order Denying Attorneys' Fees of the United States District Court for the Northern District of Texas, from which

Petitioner appealed, is not reported, but is attached as Appendix D to this Petition.

The Judgment of the United States District Court for the Northern District of Texas, from which Petitioner appealed, is not reported, but is attached as Appendix E to this Petition.

The Order Correcting Judgment of the United States District Court for the Northern District of Texas, from which Petitioner appealed, is not reported, but is attached as Appendix F to this Petition.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered the Judgment, from which review is now sought, on December 23, 1992. A timely Petition For Rehearing was denied by the Court on January 20, 1993. Jurisdiction is now conferred upon this Court by 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall ... be deprived of ... property, without due process of law....

U.S. Const. amend. V.

The Federal Judiciary Act of 1789, as amended, provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C.A. §1652 (West 1966).

28 U.S.C. §1254, provides in pertinent part:

> Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the

> petition of any party to any civil or criminal case, before or after rendition of judgment or decree....

28 U.S.C.A. §1254(1) (West Supp. 1992).

28 U.S.C. §1332 provides in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between -
>
> (1) citizens of different states....

28 U.S.C.A. §1332(a)(1) (West Supp. 1992).

STATEMENT OF THE CASE

This Petition arises out of the district court's denial of Petitioner W. Pat Crow Forgings, Inc.'s (hereinafter referred to as "Petitioner" or "Crow") substantive right to attorneys' fees under Texas law, without notice or an opportunity for hearing, as a sanction for Crow's alleged

failure to comply with the district court's order to segregate attorneys' fees. The following facts are relevant to the district court's order, and demonstrate that Crow was improperly sanctioned for its attorneys' honest and candid attempt to comply with that order.

On two occasions, Respondent TransTechnology Corporation (hereinafter referred to as "Respondent" or "TransTechnology") contracted with Crow to purchase frangible (breakable by explosives) nut forgings having very specific and unique physical and metallurgical properties. Pursuant to each contract, Crow was to make the forgings in accordance with the contract specifications, then ship the forgings to New Northern Engineering, Inc. in California, where the forgings would be machined into nuts, and would undergo heat treatment,

electro-discharge machining, and electro-polishing. TransTechnology would then sell the finished product, frangible nuts, to United Space Boosters, Inc., general contractor to NASA. Ultimately, the nuts were to be used to secure the solid fuel tanks on the NASA space shuttle to the mobile launch vehicle. Immediately prior to liftoff the nuts would be exploded, allowing the space shuttle to be launched.

The two contracts pursuant to which TransTechnology ordered frangible nut forgings from Crow are designated in this Petition as "Purchase Order 49047" and "Purchase Order 53528." Pursuant to Purchase Order 49047, TransTechnology ordered 151 frangible nut forgings and fully paid Crow upon delivery of the forgings. Pursuant to the second contract, Purchase Order 53528, Crow again delivered forgings

to TransTechnology, but TransTechnology withheld payment of $102,670 because of alleged deficiencies in the forgings Crow delivered pursuant to the first contract, Purchase Order 49047.

Crow filed suit against TransTechnology for breach of contract on June 20, 1985, in the United States District Court for the Northern District of Texas, Fort Worth Division. Jurisdiction in the district court was proper pursuant to 28 U.S.C.A. §1332(a)(1) (West Supp. 1991). TransTechnology responded by asserting numerous defenses and affirmative defenses to Crow's claim on Purchase Order 53528, including breach of contract of both contracts and failure of consideration as to both purchase orders. TransTechnology also asserted a counterclaim against Crow for breach of contract and deceptive trade

practices for Crow's delivery of allegedly defective forgings pursuant to Purchase Order 49047.

In the Joint Pretrial Order dated March 5, 1991 (after approximately five and one-half years of heated litigation), TransTechnology conditionally stipulated that Crow was entitled to recover on Purchase Order 53528. This was not an unconditional stipulation of liability or a confession of judgment. After this stipulation, TransTechnology continued to assert, by pleadings, its alleged defenses and affirmative defenses. TransTechnology never amended its pleadings to delete its defenses and affirmative defenses to Crow's action and did not amend its answers to interrogatories in relevant part until March 26, 1991. Further, the pretrial order containing the conditional stipulation on

Purchase Order 53528 was not signed by the district court until October 7, 1991, and was not entered as an order of the court until on or about April 14, 1992, after trial on the merits. Consequently, throughout the trial, Crow had no assurance that TransTechnology was legally and absolutely foreclosed from claiming that the forgings supplied pursuant to Purchase Order 53528 were defective, and Crow had to continue to be prepared to defeat TransTechnology's pleaded affirmative defenses to Crow's claim on Purchase Order 53528, through and including the trial of the cause in October 1991.

After TransTechnology conditionally stipulated to liability on Purchase Order 53528, the district court bifurcated TransTechnology's counterclaim on Purchase Order 49047 from trial of the attorneys'

fees issues, and realigned TransTechnology as the plaintiff and Crow as the defendant. After a trial on the merits lasting over two weeks, the jury reached a verdict on October 23, 1991, in which it found every issue in favor of Crow.

After trial of the merits, the district court ordered Crow to segregate the attorneys' fees incurred by it in prosecuting its claim on Purchase Order 53528, which included overcoming TransTechnology's affirmative defenses, from the fees incurred by it in defending against TransTechnology's counterclaim on Purchase Order 49047. Overcoming TransTechnology's affirmative defenses and defending against TransTechnology's counterclaim both involved the same underlying issues -- whether the forgings were defective. The district court also ordered Crow to submit evidence of its

attorneys' fees by affidavit prior to receiving evidence regarding the necessity of segregation of attorneys' fees. As ordered by the district court, on February 27, 1992, Crow filed the affidavits of John McBryde (Crow's attorney from June 20, 1985 through November 16, 1989), and Bill F. Bogle (Crow's attorney from November 16, 1989 to the present). The affidavits contained, through incorporation by reference of attorneys' fee statements on file, an itemization of the service provided, the time spent on the service, and the charge for the service regarding the legal work performed pursuant to Purchase Order 53528, and witnesses McBryde and Bogle also explained in great detail the difficult task they experienced with respect to attempting to segregate attorneys' fees incurred by Crow in prosecuting its claim on

Purchase Order 53528 from the fees incurred by Crow in defending against TransTechnology's counterclaim on Purchase Order 49047. Nevertheless, both witnesses McBryde and Bogle, in their affidavits, did segregate the attorneys' fees to the greatest extent possible.[1]

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[1]TransTechnology's affirmative defenses to Crow's claim on Purchase Order 53528 were based on the same allegations as its counterclaim on Purchase Order 49047. Thus, to a large extent, Crow necessarily incurred the same fees in prosecuting its claim on Purchase Order 53528, as in defending against TransTechnology's claim on Purchase Order 49047.

Crow's attorneys' inability to segregate fees in the manner, or to the extent that the district court apparently contemplated, was simply not possible in this case. As has been recognized by other courts:

> To divide the attorney's time by a jury issue or by complaint count would be transparently false precision. The work of lawyers and the progress of a case through trial is not an Orwellian assembly line of discreet jobs of quantifiable time and purpose. Lawyers should be compensated the highest for

On March 6, 1992, approximately eight days after receiving the McBryde and Bogle affidavits, without notice or hearing, the district court, sua sponte, denied Crow the right to recover attorneys' fees to "vindicate its authority."[2] Prior to

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> thinking. If, instead of appraising the value of critical analysis and effective effort, we sink to valuing lawyers by minutes or pages, we denigrate real counsel and elevate weak lawyering. The absorption in the detail of lawyers' fees is a triumph of technique over purpose.
>
> In a case of this complexity, intensity, and length, segregation of issues may well be impossible, and it is not required.

Stine v. Marathon Oil Co., 753 F.Supp. 202, 204 (S.D. Tex. 1990).

[2]The sanctions in this case were apparently imposed pursuant to the district court's inherent power. The district court did not state its authority for imposing sanctions on Crow, but it does not appear that the court imposed sanctions on Crow pursuant to Rule 11 of the Federal Rules of Civil Procedure, or pursuant to 28 U.S.C.

severely sanctioning Crow by denying Crow its substantive state law right to recover attorneys' fees, the district court did not notify Crow that it had allegedly engaged in conduct worthy of punishment and did not give Crow the opportunity to defend itself.

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§1927.

To impose a Rule 11 sanction, a court must find that the party or its attorney signed a pleading or motion that was not well-grounded in fact, not warranted by existing law, or did not present a good faith argument for the extension, modification, or reversal of existing law, or that the pleadings were interposed for an improper purpose, or to cause unnecessary delay or needless increase in the cost of litigation. Fed. R. Civ. P. 11. The district court made no such findings and the constituent elements of a Rule 11 violation are not applicable to the affidavits filed by witnesses McBryde and Bogle.

The district court could not sanction Crow pursuant to 28 U.S.C. §1927 because that statute only applies to attorneys. Browning v. Cramer, 931 F.2d 340 (5th Cir. 1991).

The court of appeals' reliance, albeit incorrect, on this Court's holding in Chambers v. NASCO, Inc., 501 U.S. ____, 111 S.Ct. 2123 (1991), also indicates that the sanction in this case was imposed pursuant to the district court's inherent power.

Further, the district court received no evidence to support its sanctions order. Crow had not been previously sanctioned or warned by the district court, and no motion for sanctions was ever filed against Crow during the entire course of the litigation.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S SANCTIONS ORDER (WHICH WAS LEVIED AGAINST PETITIONER WITHOUT NOTICE AND HEARING, AND THEREFORE VIOLATED PETITIONER'S PROCEDURAL DUE PROCESS RIGHTS) IS IN CONFLICT WITH THIS COURT'S DECISIONS IN CHAMBERS V. NASCO, INC., 501 U.S. ___, 111 S.Ct. 2123 (1991), ROADWAY EXPRESS, INC. V. PIPER, 447 U.S. 752 (1980), SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES V. ROGERS, 357 U.S. 197 (1958), AND THE DECISIONAL LAW IN THE THIRD CIRCUIT.

Pursuant to the United States Constitution, no person may be deprived of property without due process of law. U. S. Const. amend. V; Societe Internationale Pour Participations Industrielles v. Rogers, 357 U.S. 197 (1958); Eash v. Riggins Trucking, Inc., 757 F.2d 557 (3rd Cir. 1985). The Eash court held that the imposition of a monetary sanction without affording prior notice and an opportunity to be heard violated due process. Id. at 570. This Court has also held that before attorney's fees may be awarded as a sanction, pursuant to a court's inherent power, other than in emergency cases, the party must receive notice and an appropriate hearing. Chambers, 501 U.S. at ___; 111 S.Ct. at 2139. Further, with respect to sanctions imposed pursuant to the inherent power of the court, like "other sanctions, attorney's

fees certainly should be not be assessed lightly or without fair notice and an opportunity for hearing on the record." Roadway Express, Inc. v. Piper, 447 U.S. 752, 767-68 (1980) (emphasis added). Thus, to the extent the district court's sanction order constituted an imposition of monetary sanctions, Petitioner was entitled to notice and a hearing on the record.

Because the district court's order is punitive, Crow should have been afforded a high level of procedural due process. It is generally accepted that a higher standard of due process protection is required where the purpose of the sanction is to punish rather than compensate. Media Duplication Services, Ltd. v. HDG Software, Inc., 928 F.2d 1228, 1238 (1st Cir. 1991). In Societe, this Court reversed the dismissal of a claim, pursuant to Rule 37 of the

Federal Rules of Civil Procedure, for failure to comply with a pretrial discovery order. Societe, 357 U.S. at 210-12. The Societe case is closely analogous to the case at bar, in that the district court in this case imposed sanctions pursuant to its inherent power which dismissed Petitioner's claim for attorneys' fees. In fact, the district court's order states, in part:

> Accordingly, it is hereby ORDERED that Defendant Crow SHALL TAKE NOTHING BY WAY OF ITS CLAIM FOR ATTORNEYS' FEES.

As this Court held in Roadway Express, "[t]he due process concerns posed by an outright dismissal are plainly greater than those presented by assessing counsel fees against lawyers." Roadway Express, 447 U.S. at 767 n.14. Thus, while Petitioner was entitled to notice and hearing even if the district court's sanction order is viewed solely as an imposition of monetary

sanctions, Petitioner was undoubtedly entitled to notice and a hearing on the record prior to the district court's imposition of sanctions which constituted an outright dismissal of Petitioner's attorneys' fees claim.[3] See Roadway Express, 447 U.S. at 767-68

In its opinion, the court of appeals below failed to discuss the issue of whether Petitioner was entitled to notice and hearing prior to the imposition of severe and punitive sanctions by the district court, and whether Petitioner's right to procedural due process had been violated. Because Petitioner was denied procedural due

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[3]Crow's claim for attorneys' fees was severed from, and was to be tried separately from its claim on Purchase Order 53528 and TransTechnology's counterclaim on Purchase Order 49047. Thus, the district court's denial of Crow's claim for attorneys' fees, in effect, was the death penalty sanction of dismissal of Crow's attorneys' fees claim.

process, the severe sanction levied against Petitioner must be reversed.

II. THE FIFTH CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S SANCTIONS ORDER (WHICH DENIED PETITIONER ITS SUBSTANTIVE STATE LAW RIGHT TO RECOVER ATTORNEYS' FEES) IS IN CONFLICT WITH THIS COURT'S DECISIONS IN ERIE R. CO. V. TOMPKINS, 304 U.S. 64 (1938), ALYESKA PIPELINE SERVICE CO. V. WILDERNESS SOC'Y, 421 U.S. 240 (1975), AND PEOPLE OF SIOUX COUNTY V. NATIONAL SUR. CO., 276 U.S. 238 (1928).

Although a district court, sitting in diversity, may impose sanctions which, in effect, shift responsibility with respect to attorneys' fees, it may not do so if the underlying effect of the sanction creates a conflict between state law and federal substantive law or practice. See Chambers v. NASCO, Inc., 501 U.S. ____, 111 S.Ct.

2123, 2137 (1991). This Court in Chambers recognized that the limitation on a court's inherent power "applies only to fee-shifting rules that embody a substantive policy, such as a statute which permits a prevailing party in certain classes of litigation to recover fees." Chambers, 111 S.Ct. at 2136; see People of Sioux County v. National Sur. Co., 276 U.S. 238 (1928).[4]

It is the policy of the State of Texas for a party to recover reasonable attorneys' fees in a suit by that party on a written contract, as in the case at bar. This state policy has been codified by statute. Tex. Civ. Prac. & Rem. Code Ann. §38.001(8) (Vernon 1986); see Caldwell & Hurst v.

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[4]In Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240, 259 n.31 (1975), this Court recognized that, in a diversity case, state law affording or denying the right to attorneys' fees, and which reflects a substantial policy of the state, should be followed.

Myers, 714 S.W.2d 63, 65 (Tex. App. -- Houston [14th Dist.] 1986, writ ref'd n.r.e.) (the award of reasonable attorneys' fees to a plaintiff recovering on a valid claim founded on a written contract preceded by proper presentment of the claim is mandatory).

In the case at bar, Petitioner had a substantive state law right to recover reasonable attorneys' fees pursuant to a Texas statute. Under the Federal Judiciary Act of 1789, as amended, the district court was required to apply Texas law in determining Petitioner's attorneys' fees claim. 28 U.S.C.A. §1652 (West 1966); Corrosion Rectifying Co. v. Freeport Sulphur Co., 197 F.Supp. 291 (S.D. Tex. 1961) (issue of plaintiff's right to recover attorneys' fee is substantive for Erie purposes). The district court, in imposing sanctions

pursuant to its inherent power, denied Petitioner its substantive state law right to recover attorneys' fees, the underlying effect of which created a conflict between the substantive state law of Texas and the federal practice used by the district court.[5] This conflict is impermissible

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[5]The case at bar is fundamentally different from cases in which attorneys' fees are assessed against a party as a sanction. In the case at bar, no attorneys' fees were assessed by the district court. In contrast, the district court denied Petitioner's substantive right to attorneys' fees under Texas law, as a sanction. This is contrary to Texas law. Caldwell & Hurst, 714 S.W.2d at 65 ("while the trial court has discretion in fixing the amount of attorneys' fees, it does not have discretion in denying attorneys' fees entirely...."). The obvious effect of the district court's sanction order was to have Crow's state law attorneys' fees claim fall under the American rule. The American rule prohibits federal courts from awarding attorneys' fees in the absence of a statute or contract. See Alyeska, 421 U.S. at 258-59. Thus, the district court below, sitting in diversity, in essence, applied federal common law to Petitioner's substantive state law attorneys fees' claim and disregarded Texas law regarding the recovery of attorneys' fees.

under this Court's holdings, and the district court erred in denying Petitioner its substantive state law right to recover attorneys' fees by imposing sanctions.

Further, in the case at bar, the second of the twin aims of Erie R. Co. -- the "avoidance of the inequitable administration of the laws" -- is implicated. See Erie R. Co. v. Tompkins, 304 U.S. 64 (1938); Hanna v. Plummer, 380 U.S. 460, 468 (1965). First, under Texas law, Petitioner was not required to segregate its attorneys' fees, and the district court misapplied Texas law in ordering the segregation of attorneys' fees prior to receiving evidence regarding the necessity of such segregation. Flint & Associates, Inc. v. Intercontinental Pipe & Steel, Inc., 739 S.W.2d 622, 625 (Tex. App.

This is impermissible under the Erie doctrine.

-- Dallas 1987, writ denied). Secondly, under Texas law, it was entirely proper for Petitioner to put on evidence of all of its attorneys' fees, and Petitioner would not have been sanctioned for doing so in a Texas court. Under Texas law, assuming that Petitioner did not segregate attorneys' fees to the greatest extent possible, the district court had the duty to determine a reasonable fee to be awarded Crow after having received evidence of all the fees. Flint & Associates, 739 S.W.2d at 625. The Texas Supreme Court, in Stewart Title Guaranty Co. v. Sterling, 822 S.W.2d 1 (Tex. 1991), recently stated:

> Evidence of unsegregated attorney's fees is more than a scintilla of evidence of segregated attorney's fees, i.e. what a reasonable attorney's fee would be for the entire case indicates what the segregated amount should be.

Id. at 12. Once the district court had before it evidence of all attorneys' fees, the court then had the duty to make an award of a reasonable fee, irrespective of whether segregation was required. Indeed, "[w]hile the trial court has discretion in fixing the amount of attorney's fees, it does not have discretion in denying attorney's fees entirely under Article 2226."[6] Caldwell & Hurst, 714 S.W.2d at 65 (emphasis added).

Thus, the district court's sanction against Petitioner was, in a very real sense, an inequitable administration of the applicable Texas substantive law, which violated the fundamental rule that federal district courts sitting in diversity must

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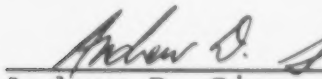
[6]Former Article 2226 is now codified at Tex. Civ. Prac. & Rem. Code Ann. §38.001 (Vernon 1986).

apply the state substantive law. See Erie R. Co., 304 U.S. at 64.

CONCLUSION

Petitioner herein prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review that court's December 23, 1992 judgment and order in this proceeding; and for such other and further relief, both general and special, at law and in equity, to which Petitioner may be justly entitled.

Respectfully submitted,



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ATTORNEYS FOR PETITIONER,
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CERTIFICATE OF SERVICE

This is to certify that three copies of this instrument was served on the attorneys of record of all parties in this cause on April 16, 1993, by hand delivery or by mailing same, in an envelope duly addressed and with first-class postage prepaid, in the United States mail, to:

Daniel J. Sheehan, Esq.
Marc Culp, Esq.
Sheehan, Young & Culp
3102 Oak Lawn, Suite 950
Dallas, Texas 75219

Andrew D. Sims

Andrew D. Sims

APPENDIX A

5 pages

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S.COURT OF APPEALS
FILED
DEC 23 1992

RICHARD E. WINDHORST, JR.
CLERK

No. 92-1323

TRANSTECHNOLOGY CORPORATION,

Plaintiff-Appellee,

versus

W. PAT CROW FORGINGS, INC.,

Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Texas

(CA4-85-358-K)

Before GOLDBERG, JOLLY, and WIENER, Circuit Judges.

PER CURIAM:*

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

In this appeal, the sole issue is whether the district court erred when it denied the plaintiff, W. Pat Crow Forgings, Inc., all of its attorney's fees because Crow failed to segregate its fees incurred in prosecuting its claim from the fees incurred in defending against the defendant's counter claim. Finding that the district court committed no reversible error, we affirm.

In this diversity case, Texas law governs whether the plaintiff can recover attorney's fees. The general rule in Texas is that the plaintiff in a contract action can recover the attorney's fees he incurs while prosecuting his claim, but he cannot recover attorney's fees he incurs while defending against a counterclaim. See Tex. Civ. Prac. & Rem. Code Ann. § 38.001 (West 1986); Flint & Assoc. v. Intercon. Pipe & Steel, 739 S.W.2d 622, 624 (Tex. Ct. App.

1987). The plaintiff can, however, recover the attorney's fees associated with defending against a counterclaim "if they arise out of the same transaction and are so interrelated that their prosecution or defense entails proof or denial of essentially the same facts." Id., at 624-625.

The district court found, inter alia, that "proof of Crow's claims rests upon different facts," and that "the record indicates that the legal work attributable to Crow's claim is easily distinguished from that required to prepare a defense to TransTechnology's counterclaim." Based on these findings, the district court explicitly ordered Crow to "segregate its attorney's fees." We cannot say that the district court erred when it ordered Crow to segregate its attorney's fee; Crow's claim and TransTechnology's counterclaim are based

on different contracts and involve different facts.

Instead of complying with the district court's explicit order, Crow submitted affidavits from its attorneys claiming they could not segregate their fees. The district court found that Crow made no attempt to comply with its order. The record will support this view of the facts. Although the district court had already found that it was possible to segregate attorney's fees, the affidavits argue that they cannot segregate those fees. It is a reasonable assessment of Crow's affidavits to say that they challenge the court's order instead of complying with it.

Concluding that Crow's conduct deliberately inhibited the district court's duty to determine the reasonableness of Crow's claim for attorney's fees, the district court denied Crow's entire claim

for attorney's fees. In this respect, the court did not exceed its authority. See Chambers v. Nasco, Inc., ____ U.S. ____, 111 S.Ct. 2123 (1991).

Thus, after reviewing all of the district court's actions, we hold that the district did not commit reversible error. The judgment of the district court is therefore

A F F I R M E D.

APPENDIX B

2 pages

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S.COURT OF APPEALS
FILED
JAN 20 1993

RICHARD E. WINDHORST, JR.
CLERK

No. 92-1323

TRANSTECHNOLOGY CORP.,

Plaintiff-Appellee,

versus

W. PAT CROW FORGINGS, INC.,

Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING

(January 20, 1993)

Before GOLDBERG, JOLLY, and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/S/ E. Grady Jolly
United States Circuit Judge

REHG-4

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

APPENDIX C

3 pages

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

U.S. DISTRICT COURT
Northern District of Texas
FILED
FEB 12 1992

NANCY DOHERTY, CLERK
By: /S/ B. Garner
Deputy

TRANSTECHNOLOGY CORPORATION,	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 4-85-358-K
W. PAT CROW FORGINGS, INC.,	§	
Defendant.	§	

ORDER

In conformance with the Court's Memorandum Opinion, entered this same date, it is hereby ORDERED that Plaintiff TransTechnology Corporation's Motion for Submission of Attorneys' Fees Issues is GRANTED.

It is further ORDERED that Defendant W. Pat Crow Forgings shall segregate its attorneys' fees.

It is further ORDERED that Defendant shall have ten days after receiving notice of this Order to submit affidavits evaluating the work performed pursuant to Purchase Order 53528. Such affidavits shall verify the reasonableness of fees incurred and may be supported by relevant exhibits.

It is also ORDERED that Plaintiff shall have leave to rebut the reasonableness of any fees incurred pursuant to Purchase Order 53528. Plaintiff shall have ten days after receiving notice of Crow's affidavits to proffer rebuttal evidence.

IT IS SO ORDERED.

Certified a true copy of an instrument on file in my office on 5-12-92 NANCY DOHERTY, Clerk, U.S. District Court, Northern District of Texas
By: /S/ Pam Murphy Deputy

SIGNED this 12th day of February, 1992.

/S/ David O. Belew, Jr.
DAVID O. BELEW, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

4 pages

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

U.S. DISTRICT COURT
Northern District of Texas
FILED
MAR 6 1992

NANCY DOHERTY, CLERK
By: /S/ Barbara Garner
Deputy

TRANSTECHNOLOGY CORPORATION,	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 4-85-358-K
W. PAT CROW FORGINGS, INC.,	§	
Defendant.	§	

ORDER DENYING ATTORNEYS' FEES

On February 12, 1992, this Court entered a Memorandum Opinion and Order granting Plaintiff TransTechnology Corporation's motion to submit the attorneys' fees issue to the Court. The Court's Order, directed Defendant W. Pat Crow Forgings, Inc. ("Crow") to segregate its attorneys' fees and submit affidavits evaluating the work performed pursuant to

purchase order 53528. Crow was further ordered that it must verify the reasonableness of the segregated attorneys' fees. For the reasons that follow, the Court finds that Crow has failed to comply with the Court's Memorandum Opinion and Order.

The Court's Order determined that the attorneys' fees issue would be tried to the Court. The Court further ordered Crow to segregate its reasonable attorneys' fees. On February 27, 1992, Crow filed Affidavits that purport to comply with the explicit instructions contained in the Memorandum Opinion and Order. Crow's Affidavits indicate that no effort was made to comply

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By: /S/ Pam Murphy Deputy

with the Court's Order. Crow's conduct deliberately inhibits the Court's duty to determine the reasonableness of attorneys' fees. Based upon the Affidavits submitted, the Court finds that Crow willfully disobeyed the Court's February 12, 1992 Order and, therefore, the Court must fashion an appropriate remedy to vindicate its authority.[1]

Accordingly, it is hereby ORDERED that Defendant Crow SHALL TAKE NOTHING BY WAY OF ITS CLAIM FOR ATTORNEYS' FEES.

IT IS SO ORDERED.

---

[1]While the Court is of the opinion the conduct of Crow's attorneys in not segregating the attorneys' fees was a willful disobeyance of the Court's February 12, 1992 Order that frustrates its ability to discharge its judicial duty and, as such, deserves severe sanctions; the Court nevertheless chooses not to impose any such sanctions.

SIGNED this 6th day of March, 1992.

/S/ David O. Belew, Jr.
DAVID O. BELEW, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX E

3 pages

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

U.S. DISTRICT COURT
Northern District of Texas
FILED
MAR 25 1992

NANCY DOHERTY, CLERK
By: /S/ Barbara Garner
Deputy

TRANSTECHNOLOGY CORPORATION,	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 4-85-358-K
W. PAT CROW FORGINGS, INC.,	§	
Defendant.	§	

JUDGMENT

This action came on for trial before the Court and a Jury, Honorable David O. Belew, Jr., United States District Judge presiding, and the issues having been duly

tried and the Jury having rendered its verdict;

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By: /S/ Pam Murphy Deputy

It is hereby ORDERED and ADJUDGED that the Plaintiff TransTechnology Corporation shall take nothing by way of its claims against Defendant W. Pat Crow Forgings, Inc.

It is Further ORDERED and ADJUDGED that pursuant to a pretrial stipulation between the parties, W. Pat Crow Forgings Inc. shall have and recover from TransTechnology Corporation the sum of One Hundred Two Thousand Six Hundred Seventy Dollars ($102,670.00), including prejudgment interest at the rate of 10% per annum from June 20, 1985 to the date of this Judgment, and post-judgment interest at the rate of

4.58% per annum from the date of this Judgment until paid.

It is further ORDERED that all costs of court, less attorneys' fees, are taxed against Plaintiff TransTechnology Corporation.

It is further ORDERED that the Clerk of the Court shall close the above-styled and numbered case. All pending motions in this case are hereby rendered MOOT by this Judgment.

IT IS SO ORDERED.

SIGNED this 25th day of March, 1992.

/S/ David O. Belew, Jr.
DAVID O. BELEW, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX F

2 pages

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

U.S. DISTRICT COURT
Northern District of Texas
FILED
APR 9 1992

NANCY DOHERTY, CLERK
By: /S/ BG
Deputy

TRANSTECHNOLOGY CORPORATION,	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. CA4-85-358-K
W. PAT CROW FORGINGS, INC.,	§	
Defendant.	§	

ORDER CORRECTING JUDGMENT

On this day came on for consideration Plaintiff's Motion to Correct Judgment and the Court, having considered the motion, is of the opinion and finds that it should be GRANTED;

Certified a true copy of an instrument on file in my office on 5-12-92 NANCY DOHERTY, Clerk, U.S. District Court, Northern District of Texas
By: /S/ Pam Murphy Deputy

Accordingly, it is hereby ORDERED that Plaintiff's Motion to Correct Judgment shall be GRANTED;

IT IS FURTHER ORDERED that the judgment entered in this matter on March 25, 1992, shall be corrected to reflect an award to Defendant W. Pat Crow Forgings, Inc., in the amount of $102,670.00 plus prejudgment interest in the amount of $46,594.94.

SIGNED this 9th day of April, 1992.

/S/ David O. Belew, Jr.
Honorable David O. Belew, Jr.

FILED
MAY 14 1993
OFFICE OF THE CLERK

No. 92-1675

In The

Supreme Court of the United States

October Term, 1992

W. PAT CROW FORGINGS, INC.,

Petitioner,

v.

TRANSTECHNOLOGY CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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No. 92-1675

In The

Supreme Court of the United States

October Term, 1992

W. PAT CROW FORGINGS, INC.,

Petitioner,

v.

TRANSTECHNOLOGY CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

Respondent, TransTechnology Corporation, respectfully requests that this Court deny the petition for writ of certiorari of W. Pat Crow Forgings, Inc. seeking review of the judgment and order of the Fifth Circuit Court of Appeals in this case.

I. STATEMENT OF THE CASE

A. The Underlying Dispute

The parties entered into two separate contracts for the purchase, by TransTechnology, of specified quantities of frangible nut forgings that were to be used in NASA's

space shuttle program. (29R.7797-98) Crow delivered one lot of the forgings to TransTechnology under the first contract, Purchase Order 49047 dated November 11, 1982. (15R.3822; 29R.7798) After TransTechnology made full payment under this contract (29R.7798), TransTechnology discovered that the finished nuts produced from the forgings were defective. Tests performed in accordance with NASA regulations indicated that the defects were attributable to Crow's utilization of poor forging practices and poor raw materials. (19R.4893; 21R.5428; 15R.3897; 4R.0944-45, 0947-48)

A second lot of frangible nut forgings were delivered to TransTechnology pursuant to the second contract, Purchase Order 53528 dated October 6, 1983. (15R.3830) Although these forgings ultimately tested within the required specifications, TransTechnology refused to pay for the second shipment as an offset for its losses on the defective shipment under PO 49047. (29R.7797)

B. The Relevant Procedural History

1. TransTechnology Admits Crow's Claim Related to the Second Contract

Crow filed suit in June 1985 claiming non-payment of sums owed under PO 53528. (1R.0008) In its answer, TransTechnology alleged various affirmative defenses to the contracts and counterclaimed for Crow's defective performance under PO 49047. (1R.0012, 0016) From the beginning, Crow's counsel recognized that all TransTechnology's defenses arose from its complaints about the first contract. This understanding was first articulated in Crow's August 1985 response to TransTechnology's

counterclaims. (1R.0040) Shortly thereafter, Crow again addressed the distinct nature of the claims that each party was asserting. In a sworn discovery motion, Crow's counsel described the contracts at issue as "entirely different" and characterized the defenses raised by TransTechnology as being "based on transactions extraneous to the contract upon which plaintiff's complaint is based." (3R.0606) Counsel for Crow described TransTechnology's counterclaim as being asserted "under an entirely different contract" that "raised complex metallurgical and other scientific issues" that required Crow's counsel to expend a great deal of time and to discover "large volumes of documents and significant amounts of information pertinent to the counterclaim." (3R.0552) Counsel for Crow described Crow's complaint as "a simple breach of contract action." (3R.0552)[1]

TransTechnology confirmed Crow's understanding of the pleadings in December 1985 in its response to Crow's Interrogatory No. 21(b). In that response, TransTechnology maintained that the sole basis for each of its affirmative defenses – as well as its counterclaims – was the defective goods delivered under PO 49047. (1R.0168-70) This understanding was again confirmed during the depositions of two TransTechnology employees in September 1989. (5R.1172)

---

[1] Despite these sworn statements (made by Crow's counsel prior to the time he realized the significance of the statements in relation to Crow's claim to recover attorneys' fees), Crow now contends that the work performed by its attorneys regarding the claims related to the two separate contracts could not be readily segregated. *See* Petition for Writ of Certiorari at 11-13.

TransTechnology formally stipulated in February 1991 that Crow was entitled to recover on its claim for TransTechnology's breach of PO 53528. (13R.3405) In March 1991, TransTechnology and Crow submitted a Joint Pre-Trial Order which, in addition to defining the issues to be tried, detailed the various facts and issues of law to be addressed at trial. (29R.7787) Counsel for TransTechnology and counsel for Crow signed the Pre-Trial Order on March 5, 1991. (27R.7300) The Joint Pre-Trial Order raised no questions of fact or law regarding Crow's claim on PO 53528, and it focused primarily upon TransTechnology's counterclaim pertaining to PO 49047. Included in the Joint Pre-Trial Order was TransTechnology's stipulation that Crow had "fully performed all of its obligations pursuant to P.O. 53528 and that it is entitled to recover from [TransTechnology] (subject to any offset [TransTechnology] may be entitled to pursuant to its separate claims for relief), the amount currently outstanding on P.O. No. 53528. . . . "[2] (13R.3405-6)

---

[2] In his sworn affidavit, Bill Bogle, counsel for Crow, indicated that work performed by him after TransTechnology's formal stipulations to Crow's claim under PO 53528 pertained to recovery of that claim. (R29.7635) In support of his sworn statement, Bogle stated that the stipulation "did not waive its pleaded defenses . . . nor did TransTechnology Corporation confess judgment." (29R.7635) Bogle characterized TransTechnology's stipulation as "conditional" and used that characterization as his excuse for not segregating fees for the period including the jury trial, which only addressed TransTechnology's claim. (29R.7635) A review of TransTechnology's stipulation illustrates the absurd nature of Bogle's statements. Bogle's affidavit offered no explanation for why the stipulation in the Joint Pre-Trial Order was not binding. Crow has asserted, however, in this Court and in the court of appeals, that even though

2. TransTechnology Challenges Crow's Claim for Recovery of Attorneys' Fees for the Defense of the Counterclaim

Prior to trial, Crow sought leave to amend its pleadings to add a claim for attorneys' fees associated with its defense of TransTechnology's counterclaim. (13R.3371) TransTechnology objected to Crow's claim for fees associated with the defense of the counterclaim and this issue was included in the Joint Pre-Trial Order as an issue of law to be determined by the court. (29R.7807)

3. The District Court Issues Warnings Concerning the Recovery of Attorneys' Fees

On August 28, 1991, TransTechnology moved to bifurcate the trial pertaining to the parties' respective claims for attorneys' fees from the trial on the merits of the counterclaim and, because Crow's claim was admitted, requested that the court realign the parties. (22R.5881) The district court, by order dated September

---

both attorneys signed the Joint Pre-Trial Order (27R.7300), Crow "had no assurance that TransTechnology was legally and absolutely foreclosed from claiming" delivery of defective forgings pursuant to PO 53528 because the judge did not sign the Joint Pre-Trial Order until after trial. Petition at 9-10. Crow's claim that TransTechnology's stipulations and admissions were "conditional" strains the outer boundaries of Rule 11. In light of this most flagrant mischaracterization of the facts, TransTechnology contends that this Court cannot rely on any of Crow's characterizations of the record because those characterizations frequently are not accurate. Not surprisingly, nowhere in Crow's entire statement of the case are there any references to the record on appeal.

17, 1991, granted both requests and instructed the parties to submit a Joint Supplemental Pre-Trial Order setting forth specific information and supporting documentation concerning their claims for attorneys' fees. (23R.5914) The September 17 order contained two warnings:

1. "The parties are hereby put on notice that the Court will not entertain any testimony or argument in the second phase of this trial that is outside the scope of the Supplemental Order." (23R.5920); and
2. The court "is willing to deny an attorney's fees claim made by an attorney, firm or party that is in violation of [28 U.S.C. § 1927]" (allowing the imposition of fees for vexatious or unreasonable conduct).[3] (23R.5919)

The court issued a similar warning a few days later in a separate order in which the court stated that failure to comply with the court's order to present complete and specific information relating to the parties' claims for attorneys' fees "will result in a denial of attorney's fees as the court deems appropriate." (23R.6036)

4. Crow Intentionally Disregards the Court's Order Requiring Segregation of Attorneys' Fees

The parties submitted the Joint Supplemental Pre-Trial Order on October 4, 1991. (29R.7809) Both

---

[3] The warnings arose from a background of claims by counsel for both TransTechnology and Crow of unreasonable conduct on the part of the other. These complaints were continual throughout much of this litigation and many of these disagreements were bitter and acrimonious. *See* note 5 *infra*.

TransTechnology and Crow submitted substantial business records and information pertaining to attorneys' fees. Crow, however, refused to distinguish between the fees incurred for the prosecution of its claim on PO 53528 and the fees incurred in defense of TransTechnology's counterclaims on PO 49047. (29R.7822-23) Crow argued instead that all its fees were recoverable because it had to defeat the counterclaim *in order to collect* the amounts due on its claim. Moreover, in direct contravention of the September 17 order, Crow blatantly declared that it reserved the right to submit additional information pertinent to proving segregated attorneys' fees, if necessary, at a later time. (29R.7822-23) TransTechnology expressly challenged this attempt by Crow to reserve its rights to supplement the information submitted in conjunction with the Joint Supplemental Pre-Trial Order. (29R.7818)

Only TransTechnology's counterclaim was tried to the jury. (27R.7270-71, 7278, 7301-08) After a two-week trial in which the jury returned findings in favor of Crow pertaining to TransTechnology's counterclaim arising from PO 49047, TransTechnology asked the court to determine Crow's claim for fees by submission rather than require a second trial. (27R.7355) The court granted TransTechnology's motion by order dated February 12, 1992. (28R.7429) In its order, the court directed Crow to segregate its fees, and instructed both parties to submit affidavits and additional evidence relevant to determining the amount of the segregated fees to be awarded. (28R.7429) In a sixteen page memorandum opinion that accompanied the order, the district court expressly addressed and rejected the legal arguments previously made by Crow in support of its contention that it was not

required to segregate fees, and it instructed Crow to submit affidavits evaluating only "the work performed on Purchase Order 53528." (28R.7413-28, 7429)

5. The District Court Denies Crow's Claim to Recover Attorneys' Fees

On February 27, 1992, Crow submitted its attorneys' affidavits and other evidence purportedly in compliance with the court's order. (28R.7430; 29R.7627) Rather than segregate Crow's fees as ordered, however, Crow's attorneys testified in their affidavits that Crow's fees and expenses could not be segregated because Crow had to prevail on the counterclaim *in order to collect* the monies owed on its claim. (28R.7430-51; 29R.7627-44) In the affidavits, Crow's counsel engaged in semantic gamesmanship designed to sidestep the district court's specific instructions regarding segregation and merely reasserted, via sworn testimony, the same legal arguments regarding "net recovery" properly rejected in the court's February 12 memorandum opinion and order. For example, in his affidavit, John McBryde gave the following testimony:

> "All of the work I did . . . had as their objective the enforcement of collection. . . . "
>
> * * *
>
> "None of the work . . . was done by me solely to defeat the counterclaim . . . [because] I am satisfied . . . that the purpose of Trans-Technology Corporation's counterclaim was to frustrate the efforts of my client to collect the debt owed. . . . "

* * *

> "The fact of the matter is that all of that time [McBryde's work pertaining to the counterclaim] had as its ultimate goal the enforcement of the unpaid indebtedness owed . . . to my client. . . . "

* * *

> "Any work that was related to the affirmative defenses/counterclaim . . . was only incidental to the purpose for which this action was instituted in the first place, i.e. collection of the amount owed to my client. . . . "

(28R.7430) Crow, in re-urging these rejected contentions, failed to segregate its fees as ordered by the court and failed to provide the court any guidance as to what work related to proving Crow's claim, as distinguished from work related to disproving TransTechnology's counterclaim.[4] As a consequence, on March 6, 1992, the court entered an order denying Crow its attorneys' fees. (29R.7746) The Fifth Circuit affirmed.

---

[4] Crow argues that "Crow's attorneys' inability to segregate fees in the manner, or to the extent that the district court apparently contemplated, was simply not possible in this case." Petition at 13 n.1. This argument and Crow's arguments to the district court are premised on Crow's steadfast refusal to acknowledge the controlling law. Crow argued in the district court that the segregation issue was governed by a "net recovery" type test. This net recovery test, however, has been rejected by the Texas courts. *See e.g., Coleman v. Rotana, Inc.*, 778 S.W.2d 867, 873-74 (Tex. App. – Dallas 1989, writ denied). Having failed to avoid the consequences of this rule, the attorneys' affidavits responsive to the court's order defiantly tried to resurrect the rejected "net recovery" argument through craftily drafted affidavits. The district court saw through this ruse.

II. SUMMARY OF ARGUMENT

The issue before the court is whether Crow was unjustly deprived of its attorneys' fees in the underlying litigation. The underlying litigation involved, in Crow's own words, a simple breach of contract claim by Crow and a counterclaim by TransTechnology that implicated complex scientific and metallurgic issues. Under controlling state law, Crow was entitled to recover its attorneys' fees for work performed by its attorneys in connection with Crow's breach of contract claim against TransTechnology but not for any work performed in defending against TransTechnology's counterclaim. Before the district court could award Crow any amount of attorneys' fees, Crow was required to segregate the recoverable fees (those related to the prosecution of its claim) from the non-recoverable fees (those related to the defense of TransTechnology's counterclaim). After Crow ignored two orders and two separate warnings to segregate its fees, the district court denied Crow's application for fees. The district court appropriately viewed Crow's defiant refusal to follow a legitimate order as grounds for denying Crow its fees.

The action of the Fifth Circuit Court of Appeals in affirming the district court's order did not create a conflict with this Court's decisions and the decisional law in the Third Circuit. Nor did it deny Crow due process of law. *See* Petition at 16. This Court's decision in *Chambers v. Nasco, Inc.*, 111 S.Ct. 2123 (1991) specifically supports the district court's decision to deny Crow all of its attorneys' fees after Crow failed to comply with the district court's order to segregate its fees. Crow was given ample

notice of the likelihood that the district court would not award attorneys' fees if Crow did not comply with the court's order. Under these facts, an adversary hearing was not required before implementing the previous warnings. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 632 (1962); *FDIC v. Daily*, 973 F.2d 1525, 1531 (10th Cir. 1992).[5]

Crow also argues that the denial of its fees violated a fundamental principle of law that federal district courts sitting in diversity must apply state substantive law. *See* Petition at 21. Although Crow's articulation of the fundamental principle may be accurate, that principle is not determinative of the issues pending before this Court. Crow contends that by denying Crow its attorneys' fees the district court refused to recognize state substantive

---

[5] The district court's warnings and orders prior to denying the recovery of fees were made in reference to an extremely contentious procedural history. While Crow accurately notes that TransTechnology never filed a motion for sanctions, TransTechnology did raise serious complaints against Crow's attorneys related to improperly securing the entry of a discovery order, which order caused TransTechnology to spend hundreds of thousands of additional dollars to present the case. TransTechnology refers the Court to the following portions of the record: (1) TransTechnology's Response to Crow's Third Motion for Default Judgment (4R.0894); (2) TransTechnology's Motion to Vacate Order dated April 15, 1988 (13R.3194); (3) TransTechnology's Brief in Support of Response to Third Motion for Default and Motion to Vacate (13R.3224); (4) John McBryde Affidavit filed December 15, 1989 (13R.3331, 3332-33); (5) TransTechnology's Response to Request for Ruling (13R.3364); (6) TransTechnology's Brief Regarding March 29, 1991 Show Cause Hearing (14R.3480); (7) Order Denying Third Motion for Default Judgment dated June 24, 1991 (22R.5878); and (8) John McBryde Affidavit filed February 27, 1992 (28R.7430, 7466).

law. In essence Crow argues that the district court had no authority to do anything other than award Crow its attorneys' fees despite the fact that Crow blatantly refused to follow the district court's orders. Crow's argument is without merit. Under the circumstances of this case, the district court's order denying Crow its attorneys' fees is founded upon the well-established principle that a district court has the inherent power to control its docket.

III. ARGUMENTS AND AUTHORITIES

A. Crow was not Deprived of Due Process of Law

Crow argues first that the district court's denial of its claim to recover attorneys' fees violated Crow's right to due process of law. The law is well-settled, however, that due process does not necessarily require the kind of express notice Crow's arguments envision, nor does it require a hearing prior to the imposition of sanctions. *Link*, 370 U.S. at 626. In *Link*, this Court outlined the requirements of due process as follows:

> [T]he fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. . . . But this does not mean that every order entered without notice and a preliminary adversary hearing offends due process. *The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of its own conduct.*

Id. at 632 (Emphasis added).

In *Link*, the petitioner challenged both the power and discretion of the district court's *sua sponte* dismissal of its negligence action. The dismissal resulted from the petitioner's counsel's failure to appear at a scheduled pretrial conference with the district court. The district court, after reviewing the history of the case, found that petitioner's counsel had failed to indicate any reasonable excuse for his non-appearance and dismissed petitioner's cause of action for failure of plaintiff's counsel to appear at the pre-trial conference and for failure to prosecute the action. In doing so, the court stated that the dismissal was in the exercise of its inherent power. On appeal to this Court, the petitioner argued that procedural due process precluded the district court's *sua sponte* invocation of any sanctions authority that the court might have to dismiss the case. Applying reasoning equally applicable to the case at bar, this Court rejected the petitioner's due process arguments and affirmed the district court's dismissal of the case:

> [T]his is not a case in which failure to comply with a court order 'was due to inability fostered neither by . . . [petitioner's] own conduct nor by circumstances within its control.' *Societe Internationale Pour Participations Industrielles Et Commercials, S.A. v. Rogers*, 357 U.S. 197, 211, 78 S.Ct. 1087, 1095, 2 L.Ed.2d 1255. Petitioner's counsel received due notice of the scheduling of the pretrial conference, and cannot now be heard to say that he could not have foreseen the consequences of his own default in attendance.

370 U.S. at 636.

Moreover, notwithstanding Crow's argument to the contrary, "the right to a hearing, whether that right is

implicit or . . . explicit, is limited to cases where a hearing would assist the court in its decision." *Hill v. Norfolk & Western R.R. Co.*, 814 F.2d 1192, 1201 (7th Cir. 1987). *See also A. Hirsh, Inc. v. United States*, 948 F.2d 1240 (Fed. Cir. 1991) (where counsel was explicitly informed by the opinion of the court that her motion was without merit, there was "no genuine issue concerning constitutionally required notice and opportunity to be heard"); *Louisiana v. Sparks*, 978 F.2d 226 (5th Cir. 1992) (no abuse of discretion in *sua sponte* dismissal of action where "district court gave the parties warning prior to dismissal that if neither did anything, the case would be dismissed in two weeks"). In *Hill*, the court put it succinctly, "Where . . . the conduct that is . . . sanctioned consists of making objectively groundless legal arguments in briefs filed in this court, there are no issues that a hearing could illuminate." 814 F.2d 1201. That statement applies with equal force in this case.

After the district court directed both parties in this case to submit all information pertaining to their respective claims for attorneys fees (23R.5920), Crow refused to present any evidence pertinent to segregating its fees and, instead purported to reserve the right to do so at a later time. (29R.7817) On February 12, 1992, the court entertained each of Crow's arguments on the segregation issue and, after rejecting them, not only afforded Crow a second opportunity to introduce evidence of its segregated fees, but in fact ordered it to do so. (28R.7427-29) Again Crow refused. This refusal followed on the heels of at least two separate warnings by the district court, first, on September 17, and subsequently, on September 23, that any failure to comply with the court's orders may

result in a denial of fees. Clearly, "[t]he circumstances here were such as to dispense with the necessity for advance notice and hearing" prior to the denial of Crow's fees. *Link*, 370 U.S. at 632. Crow's due process challenge is nothing more than an attempt to avoid the foreseeable consequences of its own willful disobedience of the district court's orders.

B. The District Court's Denial of Crow's Application for Attorneys' Fees did not Create a Conflict Between State and Federal Law or Practice

Crow's second argument for reviving its claims to recover attorneys' fees is that the district court improperly applied federal law to an issue governed by state law. Crow's argument is without merit. Without regard to whether the district court could deny Crow's fees as a sanction, the denial of fees was proper because Crow failed to submit sufficient proof illustrating the amount of fees that it was entitled to recover. Once the district court determined that Texas substantive law required Crow to segregate its attorneys' fees, the court could prescribe any procedure it deemed necessary for the orderly disposition of the matter pending before it – including the issuance of an order to Crow requiring Crow to segregate the fees relating to the prosecution of Crow's claims with respect to PO 53528 from the fees relating to the defense of TransTechnology's counterclaim. Thus, assuming arguendo that state law would direct its judges to do their own work to segregate attorneys' fees when required, a district court does not violate *Erie* principles by ordering assistance from trial counsel in making such a determination in a case pending in federal court. In any

event, the district court was correct in denying Crow its attorneys fees as a sanction because Crow willfully disobeyed the directives of two court orders requiring submission of proof segregating its fees. Once Crow disregarded the district court's order, the court had inherent authority to manage its own proceedings and control the conduct of those appearing before it. *Chambers*, 111 S.Ct. at 2123. "[T]he inherent power of the court to sanction parties for misconduct cannot be made subservient to any state policy." *Id.* at 2127.

1. The Trial Court's Denial of Crow's Attorneys' Fees was Proper Because Crow was Required to Segregate its Fees and Failed to do so

In a diversity case, the recoverability of attorneys fees is governed by controlling state law. *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 259 (1975). In Texas and most other jurisdictions, it is well-settled that attorneys' fees incurred in the prosecution of a legal claim are not recoverable unless provided for by statute or agreement. *New Amsterdam Casualty Co. v. Texas Indus., Inc.*, 414 S.W.2d 914, 915 (Tex. 1967). It is equally well-settled in Texas that fees incurred in the defense of a counterclaim are not generally recoverable by statute and therefore must be segregated from otherwise recoverable fees. *Flint & Assocs. v. Intercontinental Pipe & Steel, Inc.*, 739 S.W.2d 622, 624 (Tex. App.-Dallas 1987, writ denied). The only circumstances in which fees attributable to the defense of a counterclaim are recoverable, and therefore do not have to be segregated according to the general rule, is when

the claims and counterclaims arise out of *the same transaction and* are so interrelated that their prosecution or defense *entails proof or denial of essentially the same facts. Coleman v. Rotana, Inc.*, 778 S.W.2d 867, 874 (Tex. App.-Dallas 1989, writ denied); *Flint*, 739 S.W.2d at 624-25.

As evidenced by the record in this case, Crow's claim and TransTechnology's counterclaims in this case arose out of separate, unrelated contracts and entailed proof or denial of different facts. Accordingly, the district court was correct in concluding in its February 12, 1992 order that Texas law precluded Crow's recovery of fees attributable to the defense of TransTechnology's counterclaim and in ordering Crow to segregate such fees from the fees attributable to the prosecution of Crow's claim under PO 53528. (28R.7413 and 7429)

2. Texas Law did not Require the District Court to Review all of the Evidence Presented in Connection with Crow's Claim for Attorneys' Fees to Determine how much of that Evidence was Related to the Prosecution of Crow's Claim under PO 53528

Regardless of whether the court exercised its sanction authority or ruled as a matter of law that there was no evidence of Crow's segregated fees, Texas law did not require, as Crow contends, that the district court ignore Crow's refusal to submit evidence of its segregated fees and make a fee award based on the information Crow did submit. Crow's contention to the contrary rests on two cases, *Stewart Title Co. v. Sterling*, 822 S.W.2d 1 (Tex. 1991)

and *Flint*, 739 S.W.2d at 622. Contrary to Crow's contention, *Sterling* and *Flint* are not applicable.

Crow contends that under *Flint* the district court could not order segregation of fees until after it heard evidence of all Crow's fees. *See* Petition at 25-6. Crow's interpretation of *Flint* strains credibility. In *Flint*, the issue was whether the trial court erred in *hearing* evidence of a reasonable fee for all services rendered in the case including services for which fees were not recoverable. The court held that it was not error for the court to *hear* the evidence; it would only be error to actually award fees for the services that should have been excluded. 739 S.W.2d at 625. Moreover, in a recent decision, the state court of appeals sitting in Fort Worth affirmed a denial of attorneys' fees even though the party had "submitted an extensive record of billed hours and charges" because there was "no evidence as to the breakdown in categories to make a finding." *McKenna Invs. v. Atlas Energy*, 832 S.W.2d 651, 657 (Tex. App. – Fort Worth 1992, no writ) (citing *Sterling*).

Sterling, on the other hand, addresses *only* those instances where the trial court allows evidence of unsegregated fees over proper objection and is reversed on appeal. In these circumstances, unlike the case at bar, there is no court order requiring the fee claimant to submit evidence of segregated fees, nor any violation of such order.

Crow was given the opportunity and made its argument that segregation was not required. The trial court ruled against it, and Crow was ordered to present evidence of its segregated fees. Crow, however, refused. The

affidavits Crow supplied did not comply with the court's order and did not provide the information necessary to making a proper fee award. For those reasons, the court rejected the affidavits and specifically found that they "deliberately inhibit[ed] the court's duty to determine the reasonableness of attorneys fees." (29R.7746) Accordingly, the court had no evidence from which it could determine Crow's fees and therefore, as a matter of law, was required to deny Crow's claim for fees.

3. The Denial of Attorneys' Fees under these Circumstances was a Proper Exercise of the Court's Inherent Sanction Authority

Federal courts enjoy the inherent authority to impose sanctions in addition to any sanction authority they possess by virtue of rules or statutes. *Link*, 370 U.S. at 629-631. Where sanctions are appropriate to vindicate the court's judicial authority, the court may not only shift fees where appropriate, but may impose even more severe sanctions, such as the outright dismissal of the lawsuit. *Id.*; *Chambers*, 111 S.Ct. at 2123; *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980). Despite Crow's contentions to the contrary, *Chambers* demonstrates that denial of fees is within the court's inherent sanction authority, and that any fee-shifting that may result therefrom is not affected by substantive state laws and does no harm to any *Erie* principles.

In *Chambers*, the district court taxed Chambers with approximately $1,000,000 in attorneys fees as a sanction for bad faith conduct during the course of the litigation. Those sanctions were affirmed by the Fifth Circuit Court

of Appeals and this Court. Chambers argued that the American rule precluded fee-shifting and that the district court could not tax fees for bad faith conduct because there was no substantive state law that recognized any bad faith exception to such rule. Chambers argued that by doing so, the court was engaged in improper fee-shifting which resulted in the inequitable administration of laws in violation of the principles set out in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

This Court concluded that there was no merit to Chambers assertion. This Court's decision in *Chambers* demonstrates that the district court acted well within its inherent authority to manage its own docket by denying Crow's attorneys fees as a result of its willful disobedience to the court's order to submit evidence of segregated fees. *See also Lubrizol Corp. v. Exxon Corp.*, 957 F.2d 1302 (5th Cir.), *cert denied*, 113 S.Ct. 186 (1992) ("We are not prepared to say, with the case in its peculiar procedural posture as a result of Lubrizol's failure to comply with the district court's order, that the district court abused its discretion in arriving at the amount of the fee").

IV. CONCLUSION

TransTechnology requests that this Court affirm the judgment of the Fifth Circuit Court of Appeals, grant judgment to TransTechnology against Crow for costs

associated with this appeal, and provide TransTechnology such other and further relief to which it may be entitled.

Respectfully submitted,

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